IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 241 OF 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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SHRI GANESH VALABHAI FAMILY TRUST - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Opponent(s)

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Appearance :
MRS. SWATI SOPARKAR for Applicant(s).
MRS. MONA M. BHATT for MR. MANISH R. BHATT for Opponent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 02/08/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

Smt. Swati Soparkar, learned Counsel for the

Assessee, and Smt. Mona M. Bhatt, learned Counsel for the Revenue, are heard.

2. Present is a Reference at the instance of the Assessee for its answer by the High Court on the following questions :

> *"1) Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that the assessee trust was not a genuine trust and that assessment of the income in question was liable to be made in the status of A.O.P. and that maximum marginal rate was chargeable under section 167-A?*
>
> *2) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that in the alternative the assessee-Trust was a discretionary trust because of the fact that shares of ultimate and real beneficiaries were unknown or indeterminate and hence provisions of section 164 would not be attracted and tax*

at maximum marginal rate would be chargeable?"

3. While making the Reference, the learned Tribunal has observed that on identical facts, they had referred the identical questions in Reference Application No.305/Ahd/1993, arising out of I. T. Appeal No.1185/Ahd/1986, for the Assessment Year 1982-83.

4. Before the Tribunal, it was contended that hearing of the appeal be kept in abeyance till disposal of the Reference made on Reference Application No.305/Ahd/1993, but, the learned Members of the Tribunal observed that the matter is required to be disposed of. They, accordingly, relying upon their earlier order in I.T. Appeal No.1185/Ahd/1986, dismissed the appeal and they had placed their reliance mainly on their order which was in relation to the Assessment Year 1982-83. The reference made on Reference Application No.305/Ahd/1983, was registered as I.T.R. No.331 of 1993; the same has been finally answered by this Court on 2nd August, 2005.

5. The Division Bench of this Court, in the above referred matter, has observed that the findings recorded by the Authorities and the Tribunal that the Assessee-

Trust was not a genuine Trust does not call for any interference. The Division Bench also observed that the Tribunal was unjustified in observing that the assessment of the income in question would be liable to be made in the status of Association Of Persons (AOP). The Division Bench observed that the Tribunal would be required to determine as to who is the right person in whose hands the income in question for the Assessment Year is liable to be taxed. In view of the said findings of Question No.1, the Division Bench left the second question unanswered.

6. As the very foundation for making the order has now disappeared, the order passed by the Tribunal cannot be allowed to stand, but, it will have to be observed that the findings regarding non-genuineness of the Trust are valid findings and the Tribunal would be required to consider the question that who is the right person in whose hands the income in question for the Assessment Year 1983-84 is liable to be taxed. We, accordingly, answer Question No.1 in two parts and leave the Question No.2 unanswered.

7. In accordance with the earlier directions, we also direct that it would be open for the Tribunal to

take additional evidence on record, if necessary, or to restore the matter to the file of the Assessing Officer to pass appropriate orders. The Reference stands disposed of. No costs.

[***R.S.Garg, J.***]

[***M. R. Shah, J.***]

*kamlesh**